UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN HENRY HICKS, Appellant, vs. LOUIS S. NELSON, Warden, California State Prison, San Quentin, California, Appellee.	)	No. 22054

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court to review the denial of the writ is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF PROCEEDINGS

This is an appeal from an order dated May 4, 1967, by the Honorable Oliver J. Carter, United States District Judge for the Northern District of California, dismissing a petition for writ of habeas corpus filed by appellant.

(RT 27-29). The proceedings in the state and federal courts from which this appeal derives are as follows:

After a trial by jury in Los Angeles County, in which he was represented by counsel, appellant was convicted of two counts of violating California Penal Code section 459 (burglary), two counts of violating section 288(a) of the Penal Code (sex perversion), and one count of violating section 286 of the Penal Code (crime against nature).

The established facts of record underlying these convictions are that on February 21, 1963, appellant entered a house with the intent to commit a felony, and while there, using threats to her life and to the lives of her parents, committed three sex offenses upon a fourteen year old girl. Four nights later, on February 25, 1963, again breaking into the same home, appellant proceeded to the bedroom which the girl had previously occupied. However, the girl's father who was occupying her bedroom as a precautionary measure, frightened appellant away, so that he was unable to accomplish his felonious intention.[1/] The burglaries of which appellant was convicted were found to be of the first degree, and the

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1. The facts of record are set forth in People v. Hicks, 63 Cal.2d 764 (1965), 48 Cal.Reptr. 139, 408 P.2d 747, and in the unpublished opinion of People v. Hicks, Crim. No. 9398, April 26, 1965, attached hereto as Exhibit "A". The decision by the Court of Appeal was of course vacated when the Supreme Court granted the petition for hearing.

trial court sentenced appellant to five consecutive sentences.

Appellant appealed from the judgment entered against him to the District Court of Appeal for the State of California, Second Appellate District. The District Court of Appeal affirmed appellant's convictions, but held that appellant had been improperly sentenced under California Penal Code section 654 prohibiting the imposition of multiple punishments. The Court ruled that appellant could not be sentenced for the three sex offenses for which he had been convicted, but that sentences could only be imposed for the two burglary convictions. The court also ruled in pertinent part that: "Appellant does not question the sufficiency of the evidence. It is clear that the evidence amply sustains the convictions." See Exhibit "A", page 2.

Appellant petitioned for and was granted a hearing by the Supreme Court of California. That court, in People v. Hicks, 63 Cal.2d 764, 48 Cal. Reptr. 139, 408 P.2d 747 (1965), held that under the California statute prohibiting multiple punishment, five consecutive sentences could not be imposed upon appellant for the five offenses of which he had been convicted. However, the Court ruled that appellant properly should have been sentenced for the three sex convictions which occurred on February 21, 1963, and for the burglary which occurred on February 25, 1963. Thus, the Supreme Court reversed the judgment insofar as sentence was imposed for the

first burglary conviction, and affirmed it in all other respects. Appellant later filed a petition for habeas corpus with the California Supreme Court, which was denied on July 6, 1966.

Thereafter appellant filed a petition for writ of habeas corpus with the United States District Court for the Northern District of California (RT 1-26). The District Court on May 4, 1967, issued its order permitting appellant to proceed in forma pauperis, but dismissing his petition for the following reasons (RT 27-28):

(1.) First, the court held, that despite appellant's contention that his conviction was based upon insufficient evidence, his petition showed on the face of it that there was some evidence for his conviction, and that the most that appellant's petition showed was that an evidentiary conflict was decided against him. Accordingly, the court held that there was no showing from the face of the petition that appellant's conviction was so totally devoid of evidentiary support as to be invalid under the due process clause of the Fourteenth Amendment, citing Thompson v. City of Louisville, 362 U.S. 199 (1959), and that without such a showing, no federal question was presented.

(2.) With respect to appellant's second contention that the prosecution had committed misconduct by failing to corroborate evidence elicited from prosecution witnesses, the district court held that there is no constitutional duty

to corroborate the testimony of an eye witness who was not an accomplice, and that therefore there was no constitutional merit to appellant's charge in this respect. Thus, the court held, that while the prosecution had the duty not to misrepresent evidence or to engage in deliberate concealment or nondisclosure of material evidence, there was no duty on the State to corroborate evidence in the absence of a statutory command.

(3.) Finally, the Court held that, despite appellant's allegations that he had had inadequate counsel during the course of his appeal in the California state courts, appellant had failed to allege sufficient facts to bring him within the purview of Brubaker v. Dickson, 310 F.2d 30, 32 (9th Cir. 1962). On the contrary, the court noted that an examination of the state appellate record as established by the decision of the Supreme Court in People v. Hicks, supra, showed that in fact the conduct of counsel on appeal was not frivolous. For these reasons, therefore, the court denied appellant's petition.

On June 2, 1967, appellant filed a motion for reconsideration (CT 29-36, 37-42), which was denied by the district court on June 13, 1967 (RT 43). Appellant then filed an application for a certificate of probable cause and for leave to appeal in forma pauperis (RT 44-62). Although appellant's application was not timely filed, the district

court, on July 5, 1967, excused the lack of timeliness and ordered that a certificate of probable cause issue (RT 64-65). Accordingly, this appeal follows.

The question involved in this appeal is: whether the district court properly dismissed appellant's petition for writ of habeas corpus.

ARGUMENT

I.

THERE IS NO MERIT IN APPELLANT'S CONTENTION THAT HE IS ENTITLED TO HABEAS CORPUS RELIEF, AND ACCORDINGLY, THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S PETITION.

There is no merit whatsoever in any of the contentions urged by appellant as a basis for affording him federal habeas corpus relief, and accordingly the district court properly dismissed his petition for writ of habeas corpus. At the outset, it should be noted that appellant does not renew here the contention raised below that his conviction was based upon insufficient evidence. Similarly, he does not urge here again that the State failed to corroborate testimony of a prosecution witness. Indeed, in view of the clear case authority holding that neither of these grounds constitutes a basis for habeas corpus relief, it is clear that neither of these contentions could be

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properly raised here. [2/]

Appellant does contend however that his conviction must be set aside because he was inadequately represented by counsel at the appellate level as well as at the trial level. His contention that he had ineffective representation of counsel at the trial level, however, cannot be considered here, since never having been presented to the federal district court it is a contention raised here for the first time. Hughes v. Wilson, 365 F.2d 596, 597 (9th Cir. 1966), Miller v. Gladden, 341 F.2d 972, 975 (9th Cir. 1965). Furthermore, appellant has failed to establish that this matter was ever presented to the state courts.

In any event, appellant's contention that his trial counsel was incompetent because he failed to raise the defense of intoxication is so conclusionary and general as to be without merit. Dalrymple v. Wilson, 366 F.2d 183, 185 (9th Cir. 1966). It is urged without particularity as to whether it would have been a valid defense, if true, and without regard to the fact that intoxication, while a

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2. See e.g., Fernandez v. Klinger, 346 F.2d 210 (9th Cir. 1965), cert. denied, 382 U.S. 895; and Martinez v. Patterson, 371 F.2d 815 (10th Cir. 1966), holding that it is only when a conviction is so totally devoid of evidentiary support as to be invalid under the due process clause, that habeas corpus relief is warranted. And, see also Wampler v. Warden, Maryland Penitentiary, 224 F.Supp. 37, 40 (D.Md. 1963), holding that the failure of the state to corroborate the testimony of a witness is an evidentiary matter which is not to be considered in a federal habeas corpus proceeding.

relevant factor in determining purpose, motive, or intent is not, in and of itself, an excuse for the commission of a crime. See Calif. Pen. Code § 22.

Moreover, the defense of intoxication raised here for the first time is inconsistent with appellant's earlier sworn denials of having committed the first burglary when the sex offenses occurred (RT 9), and only a supplemental part of his defense to the second burglary, when, in explanation of how his fingerprints had been found inside the house, he stated that his presence there was requested by a young woman beckoning him to come in. (RT 8-9). Thus, appellant's attempt to "fault" his trial counsel for having failed to present a defense of intoxication must be rejected.

Appellant's contention that he was ineffectively represented by counsel at the appellate level, is equally without merit as the district court below concluded. Thus appellate counsel succeeded in reversing a sentence improperly imposed upon appellant contrary to the California multiple punishment statute. Although appellant criticizes his appellate counsel now for failing to raise the question of insufficient evidence to sustain his conviction, we think the simple answer to this contention is contained in a statement set forth by the California Court of Appeal that:

> "Appellant does not question the sufficiency of the evidence. It is clear that the evidence

amply sustains the conviction."

In the face of that conclusion by the court, it is clear that appellate counsel did the best that he could under the circumstances.

Finally, appellant argues that it is unconstitutional for Penal Code section 654 prohibiting multiple punishment and Pen. Code § 671 declaring the term of sentence to be life when a maximum term of sentence is not otherwise set forth, to be construed "so as to foreclose appellant from attacking the validity of his conviction." AOB 6. We must confess that we do not understand appellant's argument in this respect. We can only note that there is nothing in either of these code sections or any other, which requires appellant or any other prisoner to serve an invalid sentence.

We respectfully submit therefore, that since the contentions raised by appellant are totally without merit, appellant is not entitled to habeas corpus relief, and that the district court properly dismissed his petition for writ of habeas corpus.

CONCLUSION

For the reasons set forth above, we respectfully submit that the order of the district court must therefore

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be affirmed.

DATED: October 10, 1967

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of the State of California

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: October10, 1967

Louise H. Renne

LOUISE H. RENNE (Mrs.)
Deputy Attorney General

E X H I B I T

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JOHN HENRY HICKS,
Defendant and Appellant.

Crim. No. 9398

APPEAL from the judgment of the Superior Court of Los Angeles County. Joseph L. Call, Judge. Affirmed in part and reversed in part.

For Appellant: Grant E. Propper*

For Respondent: Thomas C. Lynch, Attorney General; William E. James, Assistant Attorney General; Anthony M. Summers, Deputy Attorney General.

In the early morning hours of February 21, 1963, appellant broke into a house in the City of Los Angeles and, using threats to her life and to the lives of her parents, committed two violations of Penal Code, § 288a, and one violation of Penal Code, § 286, upon a 14 year old girl. Four nights later, breaking through an

* By appointment of the District Court of Appeal.

unoccupied bedroom window, appellant entered the same house and proceeded to the bedroom previously occupied by the girl. The girl's father, who was then occupying her bedroom as a precautionary measure, frightened appellant away.

An information filed against appellant as a result of these acts charged five counts: Count I, burglary (February 21); Count II and Count III, violation of Penal Code, § 288a; Count IV, violation of Penal Code, § 286; and Count V, burglary (February 25). A jury returned a verdict of guilty on all five counts and the trial court sentenced appellant to five consecutive sentences. Appellant appeals from the judgment.

Appellant does not question the sufficiency of the evidence. It is clear that the evidence amply sustains the convictions.

Appellant contends and respondent agrees that the trial court erred in pronouncing consecutive sentences on the first four counts in violation of Penal Code, § 654.[1]

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1. Section 654, Penal Code, provides:

"An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; * * *."

Respondent suggests, however, that the sentences on those counts which warrant the greater punishment should be sustained. (Neal v. California, 55 Cal. 2d 11.) Respondent's position is that if the burglary charged in Count I is not punished, then the three sex offenses may be separately punished since each was a separate act (citing People v. Slobodion, 31 Cal. 2d 555) and consecutive sentences as to the three sex offenses would be proper.

In People v. Gay, 230 A.C.A. 108, on facts similar to those at bench, the defendant was sentenced to concurrent sentences on each of five counts. The court said at p. 111: "Burglary and the crime whose intended commission rendered the entry burglarious cannot be separately punished * * *. Defendant probably could be sentenced for each of the three distinct sex offenses (see People v. Slobodion, 31 Cal. 2d 555, 561-563 [191 P. 2d 1.]) But he cannot be sentenced both for these offenses and for the burglary.

"We must affirm imposition of sentence upon the offense subject to the greatest punishment (People v. McFarland, supra, 58 Cal. 2d 748, 762). *.* * The maximum punishment for each of the * * * four offenses is life imprisonment, but the minimum terms vary. We may look to the minima in determining which offense is

more serious * * *. Burglary carries a term of 'not less than five years.' [Penal Code, § 461.] The three sex offenses are punishable by imprisonment of not less than three years (Pen. Code, § 288a; * * *), and not less than one year (Pen. Code, § 286)."

Respondent, by conceding that the imposition of punishment for both the burglary and the sex offenses was improper, admits under the theory of Neal v. California, supra, 55 Cal. 2d 11, that the sex offenses were not acts divisible from the burglary charged in Count I. It might be arguable under the reasoning in People v. Slobodion, supra, 31 Cal. 2d 555 (cited with approval in Neal) that the sex crimes here involved were divisible acts but the facts here, as already pointed out, are substantially similar to those in Gay, supra, and in respect thereof the court in Gay said at p. 111: "Defendant's purpose in entering the home was charged and found to be the commission of sex offenses."

However, we are not required to decide whether the sex offenses are separate. The minimum sentence for first degree burglary, not less than five years, is greater than the minimum sentence for any of the sex offenses.

Neal, supra, at pp. 18-19 states: "The proscription of section 654 against multiple punishment of a single act, however, is not limited to necessarily included

offenses. (People v. Logan, 41 Cal. 2d 279, 290 [260 P. 2d 20]; People v. Knowles, 35 Cal. 2d 175, 187 [217 P. 2d 1]; People v. Kynette, 15 Cal. 2d 731, 761-762 [104 P. 2d 794]; accord: People v. People, 280 App. Div. 735, 281 App. Div. 679 [117 N.Y. S. 2d 283, 288], affirmed 305 N.Y. 740 [113 N.E. 2d 421]; People v. Savarese, 1 Misc. 2d 305 [114 N.Y. S. 2d 816, 835-836]; see People v. Snyder, 241 N. Y. 81, 83 [148 N. E. 796] [interpreting N.Y. Pen. Code, § 1938, which is identical with Cal. Pen. Code, § 654].) In People v. Knowles, 35 Cal. 2d 175, 187 [217 P. 2d 1], we stated: 'If a course of criminal conduct causes the commission of more than one offense, each of which can be committed without committing any other, the applicability of section 654 will depend upon whether a separate and distinct act can be established as the basis of each conviction, or whether a single act has been so committed that more than one statute has been violated. If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses. It is the singleness of the act and not of the offense that is determinative.' Thus the act of placing a bomb into an automobile to kill the owner may form the basis for

a conviction of attempted murder, or assault with intent to kill, or malicious use of explosives. Insofar as only a single act is charged as the basis for the conviction, however, the defendant can be punished only once. (People v. Kynette, 15 Cal. 2d 731, 762 [104 P. 2d 794].) Likewise, the act of using an instrument to cause an abortion which results in death can be punished for abortion or for murder in the second degree but not for both. (People v. Brown, 49 Cal. 2d 577, 590-594 [320 P. 2d 5].)

"Few if any crimes, however, are the result of a single physical act. 'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' (People v. Brown, supra, 591.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."

The judgment is reversed insofar as it imposes consecutive sentences or any sentence for Counts II, III and IV of the information. In all other respects the judgment is affirmed.

BOTH, P.J.

I concur:

MERRIAM, J.

I concur, on the ground that the evidence shows that the three sex offenses were not divisible acts but rather were phases in one continuing sexual assault for which only one punishment could be given. (People v. McFarland, 58 Cal. 2d 748, 760-763.) Since the burglary sentence carries a more severe punishment than the punishment for any one of the sex offenses, it is the sentence we sustain for defendant's criminal conduct on February 21.

FLEMING, J.